Indeterminacy in the law: Types and problems

Indeterminacy in the law: Types and problems

by Lorenz Kaehler

I. Problem

Various legal scholars have maintained that the law is indeterminate. Among them are theorists from the free law movement such as Kantorowicz; legal realists such as Llewellyn; positivists such as Kelsen; critical legal scholars such as Kennedy; pragmatists such as Posner and postmodernists such as Hutchinson. They agree on the observation that appellate courts could often come to different solutions that would be equally acceptable as being legally valid. Furthermore, they deny that the law determines each legal proposition necessary to decide a case. Therefore, legal propositions would exist which are judged by the legal sources and accepted argumentative techniques neither true nor false. The idea of such propositions being neither true nor false can be traced back to Aristotle (Organon II, De interpretatione, ch. 1, 16a). If the indeterminacy thesis is correct, the neutrality and objectivity of legal decisions becomes questionable and possibly its legitimacy. For, if the law does not conclusively determine a decision, other factors like the personal view of the judges may play a role. The indeterminacy thesis is a recurring theme in legal theory and is closely connected to discussions about the rationality of legal argumentation, judicial discretion and interpretation.

II. Types of indeterminacy

The various claims that the law is indeterminate are not identical. The underlying theories do not only have different conceptual and epistemological backgrounds but also concern different types of indeterminacy: The most widespread claim concerns the normative indeterminacy meaning that the law does not give a conclusive answer as to how judges shall decide a case. Such indeterminacy can have manifold reasons. In the case of formal indeterminacy the law does not sufficiently determine which norm shall govern a case. This might be due to conflicts of opposing rules for which no meta-rule exists, gaps in the law, doubts about the validity of a norm or the applicable law. In such cases the judge must decide on which basis he shall ground his decision. Substantial indeterminacy prevails if the law does not entail sufficient arguments how to apply a certain norm. Reasons for this are the abstractness, ambiguity and vagueness ("open texture") of legal concepts, principles or standards and the possibility of justifying a rule or a precedent in many different ways. The indeterminacy is most obvious in the case of abstract constitutional principles such as equality before the law or human dignity but prevails also if statutory norms use concrete concepts such as "car" or "accident". In the application of abstract norms judges can refer to them as a formal basis and insofar claim that they do not make the law. Nevertheless, the extent to which the law determines their particular arguments is questionable. Statutes are adopted by different legislators with opposing ethical, political and social beliefs so there is hardly an overall harmony in the underlying values and balancing of principles. But without such a harmony it is unclear how to infer substantial arguments from the statutes without deciding between opposing values and social visions.

Another claim concerns the factual indeterminacy of legal decisions meaning that it is uncertain how the courtswill decide. Hardly anybody maintains that the law as a body of rules causes the judge to decide in a particular way. But even additional factors like the social background of the judge, his income or political preferences might not determine the decision because of the complexity and difficulty of applying the law. Factual and normative indeterminacy are independent from each other. Some theorists claim, for instance, that the law is to a great extent determined by the attitudes of the judges and is thus factually determinate while the "legal factors" are not conclusive. They explain the predictability of cases in the courts of first instance by attitudes of the judges rather than dogmatic necessity. Even a decision that is by the previous standards wrong would most of the time be accepted as legally valid if a court presents it in the dominating legal terminology and with the established argumentative techniques. Vice versa, some claim that the law is normatively determinate but factually indeterminate because of the uncertainty surrounding whether judges will reach the correct decision. Thus, they explain the discretion of judges by the difficulty in applying the correct methods and principles and in finding the most convincing arguments.

Influenced by the late philosophy of Wittgenstein some have maintained the linguistic indeterminacy of the law. They refer to the thesis that no rule can determine the scope of its own application. Words are not necessarily "hooked" to things so that there is no necessary or natural way of using them. Therefore, there would be no difference between the application and the creation of a rule. Such a claim is also prominent among postmodern philosophers maintaining that no text has a determinate meaning and that there always remains a difference between the legal text as the signifier and its application to the case as the signified. Similarly, some found the indeterminacy thesis on Quine's claim (1960, pp 40) that it is impossible to infer the meaning of an utterance completely from observation sentences because there always would be various interpretations compatible with these observations. Equally, a judge could not be sure how to interpret the legislator. As physical theories are underdetermined by the empirical data, the empirical "legal data" such as statutes and precedents could not determine the decision. Linguistic indeterminacy is one reason why many have maintained the normative indeterminacy of the law. Yet, the two are not identical because normative not-textual arguments might influence a decision. For instance, some claim that normative indeterminacy results from the complexity of cases before the court rather than from some ontologically necessary characteristic of the law as expressed in language or formulated in rules.

All types of indeterminacy can be further distinguished by wether the indeterminacy is epistemic (we do not know the answer) and metaphysical (there is no answer). Metaphysical normative indeterminacy prevails if the content of the law is insufficient to determine the question (sometimes refered to as "logical indeterminacy"). Even an ideal judge would be then unable to determine the correct legal answer. Contrary to that, epistemic normative indeterminacy exists if there is no reliable way of identifying the law. In this case, the "real" judge does not know how to decide a case correctly. The moral questions involved in the legal issues may seem too difficult for him to decide although he thinks that there might still be an unknown ideal theory to solve the question. This distinction between metaphysical and epistemic indeterminacy applies also to factual indeterminacy. Metaphysical factual indeterminacy prevails if even complete knowledge about the physical world would not suffice to know how the judge will decide because his will is free or because chance plays a role ("causal indeterminacy"). It differs from epistemic factual indeterminacy, meaning that we lack the data to predict how a judge will decide in fact ("empirical indeterminacy"). Finally, also within linguistic indeterminacy are the subcategories of metaphysical and epistemic indeterminacy. The former exists if language is by its nature incapable of determining a legal question. The latter occurs, for instance, if legal historians do not know the exact meaning of a rule although there once was such a meaning.

Claims about indeterminacy vary in scope and degree. First, they vary in scope because not all theories claim that each legal question is indeterminate. Rather, moderate theories about indeterminacy limit their claim to the thesis that some cases and legal questions are indeterminate. In contrast, radical theories maintain the indeterminacy of each legal proposition. They argue, for instance, that each proposition depends on the basic beliefs of the linguistic community. Therefore, no single decision exists that is completely determined by the law as an independent entity. A different terminology for this distinction between moderate and radical indeterminacy is the distinction between local and global indeterminacy.

Second, claims about indeterminacy vary in degree. For even if a legal question is indeterminate some answers may still be excluded. If there are, for instance, 10 possible answers to a certain question, 8 might be incompatible with the constitution, statutes, etc., whereas the correct answer is still indeterminate because of the choice between the remaining 2 answers. Thus to defend the indeterminacy thesis it is not necessary to claim that for each legal question there is an unlimited number of equally valid answers. It suffices to show that there is one question for which exist two equally valid answers. One frequently used metaphor to describe the limited indeterminacy is a "play" or a "game". As every game presupposes some determinate rules the law equally needs some determinate rules, principles, etc. Indeterminacy can, paradoxically, only occur where there is some determinacy. But as the rules of the game do not determine every move, the law does not determine every single answer.

Further, the theories differ as to the question of whether the law can be made indeterminate by new decisions and scholarly work. If the law is a social construct developing views of the legal community might change it. Therefore, legal groundwork might turn a determinate issue into an indeterminate one and vice versa. So a legal question may be considered as determinate just because no sufficiently skilled lawyer or no sufficiently influential group of judges have spent enough time and effort to make it indeterminate. A more modest claim is that the application of argumentative techniques suffice to make it seem indeterminate, i.e. that there is frequently an opportunity to come up with a "wrong answer" that would be accepted in the legal discourse. Consequently, a judge pursuing ideological or political aims could further them through his decisions.

Although proponents of the indeterminacy thesis are frequently associated with anti-realists who deny the possibility of (objective) knowledge about the world, sceptics who deny the possibility of (objective) knowledge about moral values and critics who deny the possibility of rational legal arguments, it is not necessarily connected with these positions. For instance, one can consistently claim that there are determinate moral answers for legal questions and still deny that the law has a determinate answer because it has no necessary reference to morality. One does not have to deny that the best available arguments support only one answer but can stress that these arguments are first not neutral or objective and depend second on considerations of policy not deductible from the legal sources. Furthermore, to claim that the law is indeterminate does not involve the rejection of truth, objectivity or rationality of legal propositions although people who reject these notions are mostly committed to the indeterminacy thesis.

III. Responses

As manifold as the claims about the indeterminacy of the law are, the responses are just as varied. One popular answer is to deny that the law is normatively indeterminate of a practically relevant degree or scope. The legal materials would most of the time suffice to settle an issue. Such theories refer, for instance, to legal norms that overcome the indeterminacy of ambiguous concepts, conflicting rules and gaps. Most prominent is the claim that principles provide valid answers even in hard cases because opposing arguments, rights, principles could be balanced and legal texts, as well as the rich legal tradition, interpreted (cf. Dworkin 1977). At least, the reference to morality would provide the necessary

metaphysical determinacy. If so, then there is a right and a fortiori a determinate answer to each legal question. But then the question becomes to how reliable the legal methods are to identify the correct answers. Other theories refer to burdens of proof, presumptions or other closure rules to overcome the normative indeterminacy. They argue that as long as there is no definite countervailing rule one has to apply the "general" rules preferring freedom of contract, freedom of speech, etc. Because of these rules conflicts of norms, gaps in the law and the ambiguity of legal texts would be solved.

Some positivists have interpreted the indeterminacy of legal texts as the legislator's delegation of the decision to the judge (cf. Kelsen 1960, p 249). In this view the procedural law compensates the substantial and formal indeterminacy. Whatever the judge decides is what the law requires. What appears, at the first glance, as a gap is just a reference to his decision. Similarly, some have tried to compensate the legal indeterminacy by the institutional arrangement of the courts. They argue that the legal texts alone might be indeterminate but that the particular context of each decision, the "legal process", institutional experience, "hunch", etc. determines both how the judge shall and how he will decide.

A response mainly aimed against the linguistic indeterminacy consists in the claim that the law is firmly founded in a linguistic community or, an established form of life. So some maintain that there might be "philosophical" problems as to how knowledge is possible and how the language works but claim that this has nothing to do with legal interpretation. Lawyers could in most cases rely on the sufficiently determinate ordinary language or specified technical expressions. Once a language is established, lawyers could rely on its ability to determine the meaning of words and would not have to bother about its foundation and the difficulty in translating its meanings into another language.

Many critical legal studies scholars have objected to these responses. They argue that the law contains contradictory rules because of which one could infer opposing results from the legal materials. Images of legal necessity would mystify the power exercised by judges and hide their ideological preoccupations. The determinacy claim could restrict the search for alternative solutions. A considerable part of their "internal critique" is not aimed to demonstrate necessary characteristics of the law but rather to criticize the actual legal discourse. Thus their aim is not a new theory by which law is by its nature indeterminate but instead the (interminable) demonstration that the existing law of a particular field was influenced by (hidden) ideological choices.

Some have doubted the practical relevance of the indeterminacy thesis. They have criticized the implicit premise of many theories that legal decisions are only legitimate if completely determined by the law. So Kress argues that judges are trusted with discretion and some degree of indeterminacy is acceptable because of their impartiality, training, and experience (Kress 1989, pp 293, 327). Similarly, some argue that even if a question is not determined by the law the rule of law remains intact. Some indeterminacy would be even necessary to secure the flexibility of the law in a changing society.

The discussion about the indeterminacy of the law may influence it. For if the view prevails that the law is indeterminate and considerations of policy play a great role, the perceived legitimacy of such considerations increases. They could then enter into the legal discourse to a greater degree than previously accepted. Vice versa, the conclusion that the law is only to a moderate degree indeterminate might factually delegitimize policy arguments and decrease their role in legal debates. Therefore, the indeterminacy debate can not only influence the discourse about the ontological status of the law and its legitimacy but also the daily legal discourse about particular issues.

Related entries

Critical Legal Studies, Decision-making, Discretion and arbitrariness in adjudication, Ronald Dworkin, Free Law, Gaps in the law, Hans Kelsen, Objectivity of Law, Right answer to legal questions.

Bibliography

Anthony D'Amato, 'Legal Uncertainty', 71 California Law Review 1 (1983)

Ronald Dworkin, Taking Rights Seriously, London: Duckworth, 1977

Timothy Endicott, Vagueness in Law, Oxford: Oxford University Press, 2000

Ari Hirvonen (ed.), Polycentricity, London: Pluto Press, 1998

Allan Hutchinson, 'Democracy and Determinacy: An Essay on Legal Interpretation', 43 University of Miami Law Review 541 (1989)

Hermann Kantorowicz (under the pseudonym: Gnaeus Flavius), Der Kampf um die Rechtswissenschaft, Heidelberg: Carl Winter's Universitaetsbuchhandlung, 1906; Italian: La lotta per la scienza del diritto, Milano-Palermo-Napoli: R. Sandron, 1908

Hans Kelsen, Reine Rechtslehre, 2nd edition, Wien: Verlag Oesterreich, 1960, reprint 2000; English: Pure Theory of Law, Berkeley: University of California Press, 1967

Duncan Kennedy, 'A Semiotics of Legal Argument', in: Academy of European Law (ed.), Collected Courses of the Academy of European Law, Volume III, Book 2, pp 309; A Critique of Adjudication, Cambridge, Mass.: Harvard University Press, 1997

Ken Kress, 'Legal Indeterminacy', 77 California Law Review 283 (1989)

Willard Van Orman Quine, Word and Object, Cambridge, Mass.: Technology Press of the MIT, 1960